

ORIGINAL

7848  
No. 7848

IN THE

18

United States  
Circuit Court of Appeals  
For the Ninth Circuit

UNITED STATES OF AMERICA,

*Appellant,*

VS.

DEWEY M. SHAFFER,

*Appellee.*

Transcript of the Record

*Upon Appeal from the District Court of the United  
States, for the District of Idaho,  
Southern Division.*

OSTER PRINTING Co., BOISE, IDAHO

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Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

---

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IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF IDAHO,  
SOUTHERN DIVISION

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DEWEY M. SHAFFER,

*Plaintiff,*

vs.

UNITED STATES OF AMERICA,

*Defendant.*

---

No. 1677

COMPLAINT

Filed Dec. 15, 1931.

COMES NOW, The plaintiff in the above entitled action and complaining of the defendant, alleges as follows, to-wit:

I.

That the plaintiff herein is now a resident and citizen of Boise, Ada County, State of Idaho, in the Southern Division of the District of Idaho.

II.

That on the 15th day of April, 1917, the plaintiff enlisted for military service in the United States Army and served as a member of said United States Army continuously until he was honorably discharged from the United States Army on July 18, 1919.



## III.

That while in the said United States Army and during the period between his said enlistment and his honorable discharge, as aforesaid, this complainant, desiring to be insured against the risks of war, applied for a policy of war risk insurance in the sum of Ten Thousand and No/100 Dollars (\$10,000.00), and at the time of said application, authorized the deduction from his service pay of all premiums, that might become due thereon and thereafter there was deducted from his monthly pay certain sums of money as premiums for said insurance.

## IV.

That a certificate of war risk insurance was duly issued by the terms whereof the defendant agreed to pay the plaintiff Fifty-seven and 50/100 Dollars (\$57.50) per month in the event that he suffered total and permanent disability, but that no policy of insurance was ever delivered to the plaintiff.

## V.

That while the plaintiff was in the military service of the United States, as aforesaid, and during the World War, and while said policy was in full force and effect, and as a result of his military service, the plaintiff herein underwent great hardship and suffering, exposure and fatigue, and on or about July, 1918, became afflicted with tonsilitis, and on or about February, 1919, became afflicted with influenza, pleurisy and pneumonia, and on



or about February, 1919, became afflicted with tuberculosis, pleurisy and asthma, and that plaintiff has continuously suffered from and been afflicted with said last named diseases from a time prior to said discharge and from a time when said insurance was in full force and effect, and this plaintiff is informed and believes, and upon such information and belief alleges the fact to be that as a result thereof, the said plaintiff was, at the time of his said discharge, and at the time when said insurance was in full force and effect, totally and permanently disabled, and that this plaintiff is informed and believes, and upon information and belief, alleges the fact to be that he will always be so disabled and never again able to follow any substantially gainful occupation. That by reason thereof, he became entitled to receive from the defendant, the sum of \$57.50 per month from the date of discharge, to-wit: July 18, 1919.

## VI.

That heretofore, and upon October 10, 1930, this plaintiff demanded of the defendant in writing, payment of benefits of said war risk insurance, and on said date filed with the United States Veterans Bureau a written claim for said War Risk Insurance, but that said defendant and said United States Veterans Bureau and the Director thereof, and the Administrator of Veterans Affairs have disputed and denied the claim of this *defendant* and have failed and refused and now fail and refuse to make payment hereunder, and that said claim was

denied by the defendant on December 12, 1931, and that a disagreement exists between the plaintiff and defendant, and has existed since December 12, 1931.

WHEREFORE, This plaintiff demands judgment against the defendant in the sum of \$57.50 per month from the 18th day of July, 1919, together with interest thereon and his costs and disbursements herein incurred, and attorney's fees and that the Court determine what a reasonable fee to be allowed plaintiff's attorneys, and direct the payment of said fees to plaintiff's attorneys.

DELANA & DELANA,  
*Attorneys for Plaintiff,*  
Residence: Boise, Idaho

(Duly Verified)

---

(Title of Court and Cause.)

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#### MINUTES OF THE COURT OF MAR. 5, 1932

The demurrer and motion to strike the complaint herein came on for hearing before the Court by counsel for the respective parties. Whereupon the plaintiff confessed the motion to strike and the demurrer to complaint was withdrawn by the defendant's counsel.

The defendant was granted 60 days in which to answer the complaint.

(Title of Court and Cause.)

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ANSWER

Filed June 9, 1932.

COMES NOW the defendant in the above entitled action, and answering plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

Answering Paragraph I of plaintiff's Complaint, this defendant admits the allegations contained therein.

II.

Answering Paragraph II of plaintiff's Complaint, this defendant admits the allegations contained therein.

III.

Answering Paragraph III of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that on November 8, 1917, plaintiff applied for and was granted Ten Thousand Dollars of war risk insurance, and that premiums thereon were paid to include the month of July, 1919. It is further admitted that pursuant to application dated July 2, 1927, and application for conversion of even date, Three Thousand Dollars of plaintiff's war risk term insurance was reinstated and converted to a thirty-pay life policy, effective July 1, 1927, and that premiums thereon were paid to include the month of March, 1932.

## IV.

Answering Paragraph IV of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that a certificate of war risk insurance was duly issued by the terms whereof the defendant agreed to pay the plaintiff \$57.50 per month in the event that he suffered total and permanent disability while said contract of insurance was in full force and effect.

## V.

Answering Paragraph V of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

## VI.

Answering Paragraph VI of plaintiff's Complaint, this defendant denies each and every allegation contained therein, except insofar as said paragraph alleges that a disagreement exists between the defendant and the plaintiff in regard to the payment of said insurance, and in this respect it is admitted that a disagreement exists between plaintiff and the defendant.

WHEREFORE, having fully answered plaintiff's Complaint, defendant prays:

1. That the Complaint be dismissed, and that plaintiff take nothing thereby, and that defendant have judgment for its costs.

2. That if the plaintiff be found entitled to recover on the contract sued upon, that before judgment is entered, he be required to surrender the reinstated and converted policy hereinbefore set forth.

H. E. RAY,

United States Attorney  
for the District of Idaho.

RALPH R. BRESHEARS,

Assistant United States Attorney  
for the District of Idaho.

*Attorneys for the Defendant.*

(Duly Verified)

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(Title of Court and Cause.)

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AMENDMENT TO ANSWER

Filed Feb. 3, 1933.

COMES NOW the defendant in the above entitled cause, leave of Court being first had and obtained, and amends Paragraph VI. of defendant's Answer to read as follows, to-wit,

VI.

Answering Paragraph VI. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.



H. E. RAY,

United States Attorney for the  
District of Idaho,

RALPH. R. BRESHEARS,

Assistant U. S. Attorney  
for the District of Idaho.

*Attorneys for defendant.*

Leave of Court to file the foregoing amendment  
granted.

CHARLES C. CAVANAH,

*District Judge.*

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(Title of Court and Cause.)

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MINUTES OF THE COURT OF SEPTEMBER  
29, 1934

This cause came on for trial before the Court and a jury, B. F. Delana, Esquire, appearing for the plaintiff, who was also present, and Frank Griffin, Assistant District Attorney and A. L. Freehafer, Esquire, appearing as counsel for the defendant.

The Clerk under direction of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. Robert Coffey, Frank Parke, W. E. Platt, S. W. Bilderback, and James J. Attebery, whose names were so drawn, were excused for cause; E. J. Russell, John

Veatch and Walt Whitaker, whose names were also drawn, were excused on the plaintiff's peremptory challenge; and James Bennett and W. J. Vanskike, whose names were likewise drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

John Fagerstedt, A. B. White, Hugh Crabtree, Harold Packer, Wm. J. Buhler, Hubert Brooks, H. R. McCarter, A. P. Hamer, Chas. Wyman, James E. Stickles, Lawrence Sloan and Dan Regan.

A statement of the plaintiff's case was made to the jury by his counsel after which an oral stipulation of certain facts was entered into by counsel for the respective parties.

Dewey M. Shaffer was sworn and examined as a witness and documentary evidence was introduced on the part of the plaintiff.

After admonishing the jury the court excused them to nine-thirty o'clock A. M., Monday, October 1st, 1934, and continued the trial to that time.



(Title of Court and Cause.)

---

MINUTES OF THE COURT OF OCTOBER 1, 1934

The trial of this case was resumed before the court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Dewey M. Shaffer was recalled and further examined. Galen Jones, Ray Grimes, Ernest Tegarden, Grover C. Mace, Mrs. Hazel Zamp, John Ellis, A. L. Jamison, Earl Rainey, Edgar Shaffer, J. L. Shaffer, Bill McKenzie, Elbert Harvey, Dale Flora and Allen Wilcox were sworn and examined as witnesses on the part of the plaintiff.

After admonishing the jury, the court excused them to nine-thirty o'clock A. M., October 2nd, 1934, and continued the trial to that time.

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(Title of Court and Cause.)

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MINUTES OF THE COURT OF OCTOBER 2, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present. On account of illness, it was agreed by counsel for the respective parties that juror Chas. Wyman be excused from sitting further in this trial of the case, and

that the trial continue before the eleven jurors remaining in the box, and that said eleven jurors render a verdict herein. Whereupon, it was ordered that juror Chas. Wyman be excused from further attendance and that the trial continue before the eleven remaining jurors.

Orville Evans, Eb Scrivener, Dr. F. A. Smith, Dr. John Boeck, Dr. Alfred Budge, Dr. O. F. Swindell, Dr. J. L. Stewart, were sworn and examined as witnesses and the depositions of Dr. J. A. Maronde and Dr. M. H. Tallman were read in evidence on the part of the plaintiff.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Wednesday, October 3rd, 1934, and continued the trial to that time.

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(Title of Court and Cause.)

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#### MINUTES OF THE COURT OF OCTOBER 3, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Dr. O. F. Swindell, Dr. James L. Stewart and Dr. Alfred Budge were recalled and further examined as witnesses on the part of the plaintiff and here the plaintiff rests.

Ray Zancher, Roy Franklin, Dan Ackley, C. W. Whiffin and Dewey M. Shaffer were sworn and examined as witnesses and the depositions of Dr. Chas. F. Ensing, Dr. Chas. M. Tinney, Gary Austin, Dr. O. L. Essenson and Dr. D. C. McCulloch were read and other evidence was introduced on the part of the defendant.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Thursday, October 4th, 1934, and the trial was continued to that time.

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(Title of Court and Cause.)

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## MINUTES OF THE COURT OF OCTOBER 4, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Dr. N. C. Trabau and Dr. P. J. Germon were sworn and examined as witnesses and other evidence was introduced on the part of the defendant and here the defendant rests.

On rebuttal Elbert Harvey, Edgar Shaffer, Bill McKenzie and Dewey M. Shaffer were recalled and further examined, and J. H. Dodd and Howard Grant were sworn and examined as witnesses on the part of the plaintiff and here the plaintiff rests.

On sur-rebuttal C. W. Whiffin was recalled and further examined as a witness on the part of the defendant and here both sides closed.

The Government's counsel moved the Court to direct the jury to return a verdict for the defendant. After hearing counsel on the motion, the Court denied the same. The defendant asked and was granted exceptions to the order.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider their verdict. While the jury was still out, the Marshal was directed to provide them with dinner at the expense of the United States.

The jury was instructed in case of their agreement to seal the verdict and to return the same into court at nine-thirty o'clock A. M. Friday, October 5th, 1934, and the bailiff was directed to permit the jurors to disband upon their arrival at a verdict.

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(Title of Court and Cause)

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## MINUTES OF THE COURT OF OCTOBER 5, 1934

Counsel for the respective parties being present, the jury returned into court and it was agreed that the

members thereof were all present. The jury thru their foreman presented their written and sealed verdict, which was in the words following to-wit:

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(Title of Court and Cause.)

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“We, the Jury in the above entitled action, find for the plaintiff, and fix the date of the beginning of his permanent and total disability from July 18, 1919.

JOHN FAGERSTEDT, *Foreman.*”

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

The defendant was granted sixty days in which to prepare, serve and file proposed bill of exceptions.

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(Title of Court and Cause.)

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## VERDICT

Filed October 5, 1934.

We, the Jury in the above entitled action, find for the plaintiff, and fix the date of the beginning of his permanent and total disability from July 18, 1919.

JOHN FAGERSTEDT, *Foreman.*



(Title of Court and Cause.)

---

## JUDGMENT

Filed October 6, 1934.

This Cause, Coming on regularly to be heard on September 29, 1934, before the Court and Jury, Benton F. Delana of the firm of Delana & Delana, appearing as counsel for the plaintiff, and Frank Griffin, Assistant United States District Attorney, and A. L. Freehafer, attorney for the United States Department of Justice Bureau of War Risk Litigation, appearing as counsel for the defendant. A Jury was duly drawn, empanelled and sworn, and the plaintiff and defendant introduced evidence.

Whereupon, the Court submitted the cause to the Jury on October 4, 1934,

Whereupon, the Jury retired and on October 5, 1934, returned to Court, counsel for both parties being present, and presented their written verdict in words and figures as follows:

“IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

No. 1677

## VERDICT.

DEWEY M. SHAFFER,

*Plaintiff,*

vs.

UNITED STATES OF AMERICA,

*Defendant.*

“We, the Jury in the above entitled action find for the plaintiff, and fix the date of the beginning of his permanent and total disability from July 18, 1919.

JOHN FAGERSTEDT, *Foreman.*”

The said verdict was duly recorded in the presence of the Jury, read to them, and they each affirmed the same.

WHEREUPON, Upon such verdict, It is Ordered, Adjudged and Decreed, And the Court does hereby order, adjudge and decree:

## I.

That the plaintiff, Dewey M. Shaffer, became and was totally and permanently disabled on the 18th day of July, 1919, and ever since said date, has been and now is totally and permanently disabled, and that there is due and owing from the defendant to said plaintiff, Dewey M. Shaffer, on the policy of war risk insurance as described in the complaint in this action, and that



the plaintiff do have and recover from the defendant the sum equal to the accrued payments now due for Fifty-seven and 50/100 Dollars (\$57.50) per month from the 18th day of July, 1919, to and including the month of September, 1934, or a total sum of Ten Thousand Five Hundred Twenty-two and 50/100 Dollars (\$10,522.50).

## II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That ten per cent of all sums to be paid pursuant to this judgment is hereby fixed as a reasonable attorney's fee to be allowed to Benton F. Delana, as attorney for the said plaintiff, the same to be paid to the said Benton F. Delana by the Veterans Administration of the United States, or the Agency having charge of the payment of the same, out of any and all payments to be made to the said Dewey M. Shaffer, or to his estate, or to the beneficiary or beneficiaries under said insurance policy.

Dated this 6th day of October, 1934.

CHARLES C. CAVANAH,  
*District Judge.*

---

(Title of Court and Cause.)

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BILL OF EXCEPTIONS

Filed April 10, 1935.

Be it remembered that the above entitled cause came

on for hearing before the Honorable Charles C. Cavanaugh, Judge of the above entitled court, sitting with a jury at Boise, Idaho on September 29, 1934, and the trial of said cause continuously thereafter until the return of the verdict of the jury on October 5, 1934 and until the entry of the judgment herein on October 6, 1934, the issues being formed by plaintiff's complaint and the defendant's amended answer thereto, Benton F. Delana of Delana and Delana, Boise, Idaho, appearing as attorney for the plaintiff and J. A. Carver, United States Attorney for the District of Idaho by Frank Griffin, Assistant United States Attorney and A. L. Freehafer, Attorney for the Department of Justice, of Boise, Idaho, appearing as attorneys for the defendant, whereupon and whereafter the following proceedings were had in respect of the assignment of errors involved in this appeal.

Plaintiff made his opening statement.

(DR. O. F. SWINDELL was called as a witness for the plaintiff and testified as follows:)

### DIRECT EXAMINATION

Q. Now, then, will each one of you doctors listen to this question I am about to ask here. Each one of you doctors may assume the following facts: That Dewey Shaffer enlisted in Company B, Second Idaho, on April 15th, 1917; that he went overseas on December 24th, 1917; that he debarked at Liverpool, England, and went to LeHavre, France; in January, 1918 he landed at Camp

Dijon, France; that along in March, 1918, he took quite a severe cold and had a cough; that he had a running of the ear, that he was confined to quarters for a period of from two to three weeks; that after being confined to quarters for two or three weeks he was placed on light duty consisting of taking dishes and victuals to the 'mumps' camp, where some boys were confined with the mumps; that he was placed on regular duty drilling heavy artillery until July 14th, about that time; that during this time Mr. Shaffer coughed continuously, that he had some difficulty in breathing; that on July 14th he contracted a heavier cold than the one had before, and was placed in a hospital and spent four days there; that during that time he had night sweats and his cough was more severe; that he was returned, not to duty, but to light duty, the light duty consisting of helping the cook in the kitchen and waiting on table, and washing dishes; that after he returned to light duty, he noticed himself and his fellow companions noticed that he had a cough and that his cough increased, and that his breathing was difficult, and that a part of the time he was not able to be on light duty; that through July and August the weather was pleasant and they were at the Chateau-Thierry on the front, and that he went to the Meuse-Argonne, the St. Mihiel front, and from August the weather was very sloppy and wet underfoot, and they wore rubber boots and big hob-nailed shoes, that they camped out in the open and laid on the ground, that it became foggy and

the weather became colder and disagreeable; that he had night sweats throughout this time, and that one of his buddies said that he had night sweats and his breathing was difficult, and several of the other boys with him said the same thing; that they would come in at night and go to the kitchen where he was supposed to be waiting, and that some of the time he would be in bed and not get up, that he was coughing and wheezing, and that his buddies would go in and see if there was anything they could do for him; that his cough increased, and the difficulty in breathing increased, and that at Armistice time he was placed in his billet, and that his cough increased up until about December 2nd, and his hard breathing increased. On December 2nd they started for France and traveled in trucks,—

THE COURT: What do you mean when you say 'they started for France?'

MR. DELANA: I beg your pardon. I should say they started from France and into Germany, and that all except two or three nights they stayed in the open and that it was snowing and raining and sleeting, and that Mr. Shaffer's cough became worse and his breathing more difficult; that about December 22nd, about three days before Christmas, he was taken off light duty and had missed a number of days; that he was finally taken off entirely and was confined to his quarters; that on December 22nd, 1918, this happened, and that he remained on light duty, and while he so remained his



cough increased and his hard breathing increased; that on February 14th, 1918 when he was placed in the hospital, and he remained in this hospital from February 14th until some time in April, and that at the time of entry to the hospital he had a temperature of 101 in the morning, and an afternoon temperature of about 103; that the admission to the hospital occurred on February 14th, 1919 as shown by the admission card; that under date of February 14th, 1919, the diagnosis is: Pleurisy, serofibrinous. On February 15th the service records show, lower lung, lower and middle lobe of right lung show numerous rales and increase in vocal fremitus; under February 20th the record shows the diagnosis of increased vocal fremitus and subcrepitant rales in right lower; February 24th shows by a lung examination flatness over right base, posterior, and the breath sounds about the same area, temperature 102; on February 25th the chest was tapped in the sixth interspace and mid-auxiliary line and 100 c.c. of clear yellow fluid withdrawn; and later on March 8th it shows a few moist rales in the right lower lung. Sheet 2 of this clinical record shows pleurisy, serofibrinous, with tachycardia; on March 20th, roughened breath sounds over the entire left chest, and no rales, left chest shows marked increase in vocal fremitus over right upper, absent breath sounds and diminished fremitus right lower; on March 23rd, pleurisy continues hard; March 26th the same, vocal fremitus still exaggerated in right upper, with exaggerated

breath sounds on left, diminished fremitus over right lower, pulse continues high; April 3rd, developed,—I can't read that word, but the next is angina; April 15th, patient very anemic. You may assume that when he got to New York,—by the way, he was taken to France and landed in Brest and was kept in a hospital for a week or ten days, and then he was brought in a hospital ship to New York, and placed in a hospital and diagnosed in New York on May 30th as pleurisy, with effusion; he was brought from New York to Salt Lake City in a hospital train with nurses, and while in the service it is testified that along in March one of his buddies went to visit him and he was very thin and very emaciated, and very poor, he was so listless that he didn't carry on any conversation, and one of his buddies went to visit him while he was in the kitchen and he passed him about five feet, and didn't know him, and one of his buddies who knew him as a boy testified that he was in such a condition that he didn't recognize him within about five feet of him; another buddy went to visit him and he walked with him, and when he was walking three blocks sat down twice to rest, and he walked as if he was very weak, and he didn't recognize him until he walked up within a half block of him; that he then took him and placed him on a billet and gave him a can to spit in, that he was weak and emaciated; that he was visited by his folks while he was in Salt Lake City on about July 4th, 1919, and while there at Fort Douglas in Salt Lake City he kept

asking his doctor to get out of the service, telling him that he wanted to be discharged, and his folks left him there, and he kept on asking for his discharge from service, and the doctor told him that he was not ready to release him, but finally on July 18th, 1919, he was discharged from service, and the manner of discharge was that he was sent down with fifteen or twenty other fellows, and they went to a room and he was presented with some blanks, some papers, for his signature, and he signed them; that they were not read to him; that he was not examined by a doctor at the time of discharge; and further that about the date of his discharge he was presented with a typewritten or printed blank whereon this question appears: 'Have you any reason to believe that at the present time you are suffering from the effect of any wound, injury or disase, or that you have any disability or impairment of health, whether or not incurred in the military service?' and the typewritten answer appears: "No." And on the same date his superior officer made a certificate which reads, "I certify that the soldier named above has this day been given a careful physical examination, and that it is found he is physically and mentally sound." You may assume further that immediately following his discharge from the service he returned home; that he got off the train or car and walked about a mile home, and his sister went to meet him and didn't recognize him because of his paleness, weakness, and change in his condition; that that night he slept



with his brother, and that he kept his brother awake by coughing and wheezing, and the next night his bed was changed and he was placed on the front porch, and thereafter his sister and his father and brother slept in rooms that were away,—they were the second rooms from him, and they heard him coughing and wheezing; that about the same night of the day after he got home he went to a doctor at Middleton, Doctor Hammer,—Doctor Hammer is not able to testify at this hearing,—and within two weeks after his discharge he went to Doctor Gue, and he told him to go to the mountains; that Doctor Gue had taken some X-rays, and that he, Mr. Shaffer, had made an attempt to get the X-rays but was not able to. That he went to the mountains and his chest pained him more, and his cough was worse, and that he came back within a couple of days; that he came back to Boise and went to Doctor Tolman; that he went there and was given a physical examination, a sputum examination and an X-ray was taken; that Doctor Tolman also punctured his lung and took from him a cup to a cup and a half of yellow fluid; that Doctor Tolman testified that he had diminished breath sounds, positive sputum, limited motion of the chest, and that the X-ray and the entire examination had shown that he was moderately advanced with a tubercular condition, active condition, that Doctor Tolman treated him for about six weeks, and that he stayed at home the rest of the fall and winter, and went to bed in the mornings, and gen-

erally again in the afternoons; that he just laid around and didn't do anything; that his cough continued and his hard breathing continued, and that he bothered his folks and kept them awake some of the night, and along in the spring of 1920 that he leased a part of his father's place,—you may assume, first, that during the fall that he didn't play around with his boy friends; some of his boy friends told about their going swimming, and his having trouble walking about half a mile, and he didn't go in swimming with the other boys. During the fall in playing games there since he had come home, he didn't play in any of the games but just watched them, and didn't participate. He leased his father's place, or a portion of it, but his father put in most of the crops; that Mr. Shaffer stayed in bed most of the time and his cough continued, and his hard breathing also continued, and his father and the rest of the family helped him during that year; that about June, 1920, his brother-in-law came over and stayed with him, and did most of the work on the place, Dewey went out to help run a binder but all that he did in assisting in the cutting of the grain was to bring the horses, and to relieve his brother-in-law at mealtimes; and that he did some shocking of grain in the evenings for a couple of hours, and that while he was doing this shocking he had a coughing spell, and that his brother helped him to the house; he didn't help with the threshing except that he was kind of the supervisor, but did not do any of the work, and stayed in

the house most of the time; that during September his brother-in-law had a job loading gravel, and Mr. Shaffer attended to the trap on the gravel pit; the gravel was loaded from a trap door and Dewey's job was to scrape the loose gravel into the truck, and also to keep track of the number of loads that were taken out; he was able to do this work for about half of the time that he was there; while he was there working he had a bunk on which he could rest, and he rested probably about half of the time; that one time his father came to visit with him and he was weak and emaciated and looked tired, and his father volunteered to relieve him, and did relieve him that day; that in the winter of 1920 and '21 he stayed at home and didn't do anything; that is, he didn't do anything a great deal of the time but just stay around the house lying down on the cot or on the bed; that in the spring of 1921 he was married and rented a ranch near Kuna; that he went out and endeavored to plow and was seized with a pain in the chest and with coughing and this hard breathing which continued; he went to the house and he was relieved there at this job of plowing by his brother and some hired help, and he did none of the harrowing of the ground, but when it was ready for the grain he went out and tried to drill, and while drilling he was seized with a coughing and wheezing spell, and his wife went out and relieved him and did the rest of the drilling, and that he endeavored to run a mowing machine during the time they were putting up hay, and was

seized with a coughing spell and didn't mow any more of the hay; that during the haying he endeavored to pitch hay on the loads and became exhausted, and then he went to the haystack and tried to handle the fork there, and that he did that until shortly after noon when he was seized with a coughing and wheezing spell, and he went to bed for the rest of the afternoon; that at the time the grain was harvested it was done with a combine harvester and the people that did this harvesting with this combine, to pay for it and the help, took all of the grain except nine sacks; that the crop was put in by his brother-in-law, and other relatives as I have stated; on July 24th, 1921, he went to his brother-in-law's place, where they were going to get together and go to a Fourth of July celebration, that he got there in the evening and was feeling fairly well, that in the morning he was seized with a coughing and wheezing spell, and they took him on a cot to the celebration and that he laid on the cot most of the day at the celebration; that in the fall of 1921 he went with his wife to pick prunes; that he went out about seven o'clock in the morning when the rest of them went out, and that he was seized with a coughing spell, and that after that day he didn't go out until after the dew was off; that while he was working at this prune picking the climbing of the ladder and the reaching up for the prunes would bring on these coughing and wheezing spells and he would have to go to the tent and sit down and rest; that during the day this



would occur several times; that he went to Doctor Gue again for treatment; that during the latter part of September he went down to Fruitland and got a job trucking, but that he couldn't do this, and then they gave him a job as janitor, picking up the loose boxes, broken boxes and pieces and sweeping out, and that the sweeping would cause a lot of dust and it would bring on these coughing and wheezing spells, and his wife would do the sweeping for him. About the middle of October he went to Payette and got a job in a restaurant washing dishes, but that the heat and the steam there caused this coughing and wheezing, and that during the winter of 1921 and 1922 he and his wife ran a cream station in Payette, and that consisted of taking cream in big cans, but they would have to wash the cream cans and the powder they used in cleaning the cans caused him to cough and wheeze. His wife did the washing of the utensils. That they had to test the cream, and in making this test they used acid, and that this acid caused him to cough and wheeze, and his wife would do the testing of the cream, and also his wife opened up the cream station in the morning, and that he didn't come until all the way from nine o'clock until noon, that he was in bed a good deal of the time, and was sick a good portion of the time; that they kept this station until July, 1922, and that he then went to Glenns Ferry and got a job as hostler's helper, and that job was getting up and down on the engines and loading coal and water,

and throwing switches for the engineer, and in doing that it would bring on these hard coughing spells and he lost about ten days of the time he was there, and that during that time he lost considerable weight; that he did nothing further until September, and at that time he applied for vocational training, and at about the same time he was examined by Doctor Budge; he was given a complete physical examination, his chest was percussed, and examination was made by stethoscope, examination of the sputum, and the examination of the sputum showed that it contained tubercle bacilli, and the diagnosis was that he was suffering from active tuberculosis and bronchial asthma; that he then started to school in September, and that he missed some days and half days; that he came home early in the afternoon and that he was attended by Doctor Budge, and that at that time he was taking for this asthma hypodermics; that before Christmas of 1922 he had a severe attack of choking and wheezing, and that Doctor Ensign of the Veterans Bureau, and later Doctor Budge was called and gave him a hypodermic, which gave him some relief; that he continued in school until 1923, that he was sent to the University at Seattle, Washington, with the Government, and that his condition there was worse, his cough was severe, and he missed more school, and his sister testified that when he came home he was so weak that he couldn't walk upstairs, and he had night sweats, and that his pajamas and bedding were wet; and his service

record shows that he had night sweats while he was in the service, and his buddies have testified that he also had night sweats while he was in the service, and his sister testified that immediately after he got home he had night sweats, and that it was necessary to change the bed because the bedding would be wet. That he stayed in school and missed some time, until March, 1923, when he was taken to a private hospital in Seattle; that he was confined in that hospital about ten days, and then he was taken to Portland to the Veterans Hospital and remained there until about July 10th of that year; that he was by the doctors at that time sent out camping; that he went back to Seattle and got his camp equipment and on the way he was seized with a wheezing and coughing spell, and on arriving at Seattle he was weak, and all that night he was unable to sleep until toward morning and then he was allowed to sleep until noon the next day; that he left Seattle and went out on this camping trip at or near the Dalles, Oregon, and he was to be gone for a period of about three weeks, but that he went back to Portland in a couple of days; that he was released from the Portland Hospital with the advice to go to a drier climate, and that they went to Long Beach, California, taking fifteen days to make the trip, because they were driving slow on account of his condition, and he was not able to go very far at a time, he was weak and emaciated; that they got to California and rented an apartment and the next day he was asked to move



on account of the disturbance of the other guests by his coughing and wheezing; that along in September, 1923, he was visited by one of his ex-servicemen who testified that he had a very severe coughing spell, and that he burned some kind of stuff and inhaled it, and it seemed to relieve him; that he got a job with a newspaper and had a crew of men or boys under him, and that he would take the crew out and while they were working he would rest, if he wanted to, and that he continued to oversee this crew for about five weeks; that he then got a job with a real estate firm and made two sales and earned \$45.00 in about five weeks; that in December, 1923, he applied for vocational training and was given vocational training, continuing with bookkeeping; that he continued until September, 1924, and that he and his brother and his wife testified that he was out of school days and parts of days at a time, that he would come early in the afternoon, and that he had a great deal of difficulty at night in breathing, and with his coughing, that he would get up and walk around sometimes, and that sometimes at night he would get up and he and his wife would ride out in the hills as the air seemed to give him relief; that the doctor would give him hypodermics, and that in December, 1923, to September, 1924, he went,— that in December, about Christmas time, it was Doctor Moronie who gave him the hypodermic to relieve him, and that between December, 1923, and September, 1924, he would take hypos as high as twenty-five or thirty

times; that in September, 1924, the Government changed him from bookkeeping in this vocational training to electrical fixtures, to a repair man's work, and that he was with one firm for about three weeks and that during that time he missed a good deal of time; that he went to Doctor Moronie, that he was coughing and wheezing more, and that while he was doing this work he went out riding more often at night; that he worked for the Hale Electric Company for forty-seven days, and that after he had been working there for about six days he was seized with a violent coughing and wheezing spell and went home, and was there for about ten days; that he went back to work again and had another spell and was carried out by one of his fellow workers; that he then went from the Hale Electric Company to the Wilkerson Shop Company and took the same kind of training; that his wife testified on arriving home at night he would go to Doctor Moronie as high as sixty times in that year, and Doctor Moronie testified that he examined his chest, percussed, examined it with a stethoscope and took a sputum test, and testified that the sputum was positive tubercular, that he had a temperature, and that his pulse was high, that he had a wheeze, and that he had to relieve him by giving him a hypodermic; that he treated him during the two years while he was taking vocational training, and on an average of every ten days and sometimes oftener, and sometimes less, and in the fall he was taking training and that he got worse; he and his wife

then got a house at Alcadena and he quit vocational training and later came back to Eagle, Idaho, and that he was examined in 1925 by Doctor Smith and Doctor West, and that Doctor Smith testified that he was suffering at that time from tuberculosis and asthma, that he had a temperature and that his pulse was high, and that there was a limitation of the chest movement; that at about the same time he went to Doctor Budge and upon an examination of him by Doctor Budge who testified that he was suffering from active tuberculosis and that both lungs showed diminished breath sounds; that he stayed out home with his parents that winter and did nothing, and that in the spring of 1926 he rented the Ryles place east of Middleton, that in the spring he went out to plow and was seized with a coughing spell, and at one time his sister relieved him, and at another time his brother relieved him, and that in the drilling of the grain he did the drilling by working for two or three hours a day, that in the irrigating time he didn't do much of that, but that at one time he was irrigating and he was seized with a coughing spell and one of his neighbor's boys came along and put him in his car and took him home; that in the haying time he went out with his father to pitch hay and he was seized with a coughing spell, and he got one of his neighbors to take him to his place and he rested the rest of the day, and in pitching he would pitch on the bottom of the wagon until it got up high, and then the other two of them put on the rest,

and he would sit around in the shade and rest; in threshing time he did nothing except manage the crew, and during the cutting of the grain his brother ran the binder and he didn't do any shocking, but at threshing time he did nothing, except as I say, to manage the crew, that is, by the way of working. His neighbor had a thresher and he got a job hauling grain for a man by the name of Spillman, and his job was to haul the grain from the thresher to Middleton and unload it; he endeavored to handle it but it brought on coughing spells and he was unable to do that; that he has some clover to cut in a field and he went out at four o'clock in the morning and cut until the dew was off, and he got along fairly well the first morning, and that other days he didn't get along; that in shocking the clover he went out the first morning,—or, rather, the second morning, after he was out about half an hour he was seized with this coughing and wheezing spell and the rest of the time he did nothing, he didn't go back at this and did not do anything the balance of the fall; that in September he took a series of eight treatments from Doctor Elbert of Caldwell, and that same summer he went out with his brother to run a dyking machine, and this was dusty and he was unable to do this, and he hired one of the neighbors to come in and relieve him, and he went to the house; in 1927, as to his farming operations he testified he had to hire a lot of help and his expense was high, that the income was about \$125.00 in his favor,—that was not including the



depreciation of his car and the running expense and the living expense of himself and wife; in January, 1927, he ran the same place,—that is, in 1927, I should say, he ran the same place again, the Ryles place, for the second year, and he went out to plow and fence and tried to harrow, and was unable to do so; he was seized with coughing spells and went to the house; he didn't do any plowing or any harrowing; in harvest time he went out to relieve the regular man during the meal time; he didn't shock any grain at all, and during the threshing time he didn't do anything except just boss the job, and during the threshing he was seized with a very severe coughing and wheezing spell, and his brother and a neighbor boy helped him to the house, and he was not able to walk at that time without their help; he was forced to stop two or three times on the way, as these people testified that he had a hemorrhage, and that he raised about a cup or a cup and a half of blood on the way to the house; that he had a coughing spell that night, and they were afraid they were going to lose him; Doctor Budge was called about five o'clock in the morning, and he came and administered a hypo; the next night he had a severe spell again and became unconscious; that his father and brother took him riding at night and in the early morning to get relief from these severe spells of coughing and wheezing, that he was taken to Doctor Pittenger at Boise and thereafter for about a week they would go out riding at night to get relief from these severe spells; in



July 1927 he applied for reinstatement of \$3000 of the \$10,000 insurance policy; on the first page the question is asked: "Are you disabled on account of any injury or disease?" and the typewritten answer was, "Yes." And in asking on the following page whether or not he was totally and permanently disabled, the answer was written in, "No," and the explanation is that at the time he came out of the service up to 1927 he did not know that war risk insurance covered disability, and that he didn't know it until 1929 when he went to the hospital here, to the Veterans Hospital, and was told by Doctor Stallings; he testified the only disability he knew anything about was compensation disability; that he gave his history as having had treatment by Doctor Tolman for his lungs, by Doctor Gue for his lungs, Doctor Smith for his lungs, Doctor Morondie for his lungs, and these were in 1920, 1926, 1924 and 1925, and in answer to the doctor's questions he answered that he was treated in 1919 and 1920 for lungs, and also in hospital No. 77 in Portland, Oregon; that in August, 1927, he went to Doctor Boeck in Boise, and Doctor Boeck gave him a series of twenty-four treatments, and he had these treatments and that at the time he gave him these twenty-four treatments that he didn't get better and he advised him to change climate; Doctor Boeck said he was wheezing so badly that you could hear him for quite a distance; that he went to Yakima, he and his wife, got a job there in an apple warehouse, and he was there for about four weeks,

and he worked twelve days out of the four weeks; he went to Doctor Middleton at Yakima, and he was given a course of treatment for asthma, taking adrenalin as high as twelve times at night; he left Washington and went to Portersville and then he went to Lindsay. This job he had in the warehouse at Yakima trucking apples, or fruit, brought on a severe coughing and wheezing spell, and he was then given a job scattering papers around for the boxes, the fruit boxes, and this is a job that a school boy did before him; that he was taking as high as fifteen hypodermics of adrenalin during a night; he went to California and he rested there during the winter and about February 1st he leased a service station and sold oil and gas and accessories, and he got along fairly well for about two weeks, but he had the same inability to sleep, and his wife opened up the station in the morning and he would come all the way from nine o'clock until twelve, and they had a mechanic there to help with the work; his wife testified that there was about a third of the time that he was seized with these coughing spells, and sometimes was carried out, and that at one time he was taken to the Community Hospital, and there he was given some treatment by being given hypos; that he stayed there about half a day and then his wife and some friends took him home, and he had to be helped into the house; that along in April, 1928, he took about thirty hypos from Doctor Arlett, and that his condition was about the same, and he came back to

Eagle, and he was treated by Doctor Budge for asthma, and that about September 1st, 1928, he went to Washington, to Cashmere, Washington, and got a job as foreman in an orchard, and his duties there were to look after the pickers, and his testimony is that he worked perhaps a half, or a little more than half of the time while he was there, and the rest of the time he was in the tent resting, and upon going to the tent at noon or in the evening his wife or brother would find him lying down, he was taking adrenalin for relief practically every night; that he went back to California about October 1st, and got the same job that he had before, that is, distributing papers to the packers of this fruit to line the boxes with, that this took him three or four hours a day, and that he came back to Eagle after that about Christmas time in 1928, and stayed until March of 1929; that his condition got worse and he had more night sweats, more trouble at nights, and in March, 1929, he was treated by Doctor Budge for his trouble, and at that time he had a temperature; in March, 1929, he left and went to Arizona. The testimony is the first day they traveled about a hundred miles, and they took about fifteen days or two weeks to make the trip, traveling very slowly because of his weakened condition. They stayed there for about five weeks, and he got worse, and then he went from there to Ely, Nevada, and got a job for about two weeks as clerk in a hotel, and that he was taking adrenalin all of the time and taking it on the job as clerk at

the hotel, that he was having trouble and was taking this adrenalin when the boss caught him taking it one evening and he was discharged; that they got a room in an apartment house there and the landlady complained of his disturbing the other people, and they were required to move out; that they came in July, 1929, back and he went into the Veterans Hospital June 30th,—or rather on June 15th, 1930, and was doctored at that time in the Veterans Hospital and was confined to bed in the ward there taking tubercular treatment, rest in the morning and afternoon, and on getting out of the hospital he went to the mountains for his health. After he had been there for a short time he endeavored to help a sheepherder to butcher a sheep and it brought on a severe coughing spell and wheezing spell, and he was in bed for three or four days. Then he made a trip to Loon Lake, which was about five miles, and it took him six hours to make the trip, and he was there a short time when he got a sore throat and had pains in his chest, when he came back to Boise, and the doctor then sent him to the hospital, that is, Doctor Budge after giving a complete examination and taking a test of his sputum, and the sputum was positive, testified he had an active tubercular condition, complicated by pleurisy and asthma. Mr. Shaffer stayed here in Boise until November, 1930, when he left and went to California. He thought that it would be better in California for his health. They took an apartment in Venice but he disturbed the people



so much that he was requested to move, and they did move. They moved back to the east side of Los Angeles and lived there until they returned to Boise in February of 1931. During all of this time he was taking adrenalin, all winter. They lived in Boise until August, 1931, and he didn't do any work. A Mr. Wilcox testified that he slept with him in February, 1931, and that he was getting up in the night and taking adrenalin; that his bed was wet with night sweats, and that in August, 1931, he went to visit his folks at threshing time in Eagle, that he wasn't doing any work but being around there the dust of the thresher brought on a coughing spell, and about April 1st, 1932, he went up to Jordan Valley to cook; he was supposed to bring in the wood and the water, and his wife went up there to take this job; he was supposed to bring in the wood and water, but in chopping the wood and carrying the water it brought on choking and coughing spells, and made him very weak, and in carrying the water it had to be carried up an incline for about four hundred yards, and that brought on severe coughing spells, and thereafter the other men there carried the water for him; that in washing dishes the steam and the heat would bring on wheezing and coughing spells; that the last severe coughing spell he had, one of the boys went to get a car to take Mr. Shaffer to Jordan, and that during the time he was gone for the car Mr. Shaffer was taking adrenalin, and that when he came back they took him to Jordan Valley, and they



had to stop for him to take his adrenalin, and that when he came back they took him to Jordan Valley, and they had to stop for him to take his adrenalin because of the severe coughing spells; that in March 1932 an X-ray was taken at St. Luke's, and according to the testimony of Dr. Stewart it showed tuberculosis in both lungs; that about May 1st, 1932 Mr. Shaffer moved to Caldwell, Idaho, and that moving from one place to another there they had only personal effects to move, and he would have to make three or four trips in order to move them; that he had to move from one place to another because he was up in the night, coughing, and he disturbed the other people and they were requested to move, and that Mr. Wilcox testified that he and his brother and Mr. Shaffer were going on the Fourth of July on a camping trip up on Shaffer Creek, that they were to stay three or four days, that he was up all night the first night,—about all night,—coughing and wheezing, and he went to bed about sun-up in the morning and slept until noon, and that that afternoon they loaded up the car and came back home; that the last of July he went to visit his sister in Seattle, intending to stay about three weeks, that upon getting there he was seized at night with a coughing and wheezing spell, and they were up most of the night and he was taking adrenalin and didn't go to bed until the next morning; that he stayed the next night, and the third morning they left to return home; that he was in bed then about a week or ten days,—or, rather, about

ten days or two weeks. Mr. Wilcox testified he was around there for about three weeks, and that he often saw him taking adrenalin, and that he often woke him up; that about January, 1933, the only work he did,— he did no work in 1931, and in 1932 the only work he did was in a sheep camp for about a week; in 1933 all he did was to help install some streets at Caldwell for the disabled veterans, and in 1933 he had another severe spell. His temperature was taken at 100 degrees and eight-tenths; that in the latter part of September, or in the month of November he moved to another place in Caldwell, carrying his personal belongings, and that brought on a coughing and wheezing spell, and a man helped them to move. He did no more work in 1933, and in January, 1934, he was seized with a severe coughing spell, and his friend Elbert Hardy testifying that he was coughing severely, and that he went to the bathroom and that he could hear him coughing and wheezing from there; that he moved to Boise in March, 1934, and in March, 1934, he got a job with the FERA. His brother would take the horses to the job for him and take them home in the evening, and he would go home in a car; his job was driving a team, but on this job his coughing and wheezing increased and he worked for two days the first week, and one the next, and two the third. From 1928 up to the present time Doctor Budge has testified that he has been attended by him once or twice a month, that he was suffering with active tuber-

culosis and pleurisy at the times he was examined; and Doctor Swindell testified that he had active tuberculosis in both lungs, and a sputum examination revealed positive sputum on June 27th, and on July 6th and on July 27th, he had tubercle bacilli. Assuming the above facts, and assuming the definition of total and permanent disability to be, that is, total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation; and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, now, Doctor, I will ask you, assuming these facts, and taking this definition, whether you have an opinion as to the total and permanent disability of the plaintiff at the time of his discharge from the army on July 18th, 1919?

A. Yes, sir.

Q. I will ask you to state whether or not, in your opinion, he was totally and permanently disabled at the time of discharge from the army on July 18th, 1919.

MR. GRIFFIN: I would like to ask a question.

(Questions by Mr. Griffin:)

Doctor, in this hypothetical question it was called to your attention that when the plaintiff separated from the service of the United States that this question was asked: "Have you any reason to believe that at the present time

you are suffering from the effects of any injury or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?" and the answer to that is "No." And the plaintiff explains that by saying he wasn't asked that question; that there is a certificate here reading, on plaintiff's exhibit 8, by the commanding officer, "I certify that the soldier named above has this day been given a careful physical examination, and it is found that he had pleurisy R on February 14th, 1919," and that is signed by William F. Burns,—Burr, I guess it is, Major, M.C.U.S. Army. Plaintiff testified that he did not receive any examination. Now, Doctor, which of these do you believe? Do you believe the testimony in the hypothetical question, or do you assume the record as contained in Plaintiff's Exhibit 8 as being true?

THE COURT: He is asking you which of these do you take into consideration when you give this opinion?

MR. DELANA: He might take both of them together.

A. You want me to state which one I think are the facts?

Q. (By Mr. Griffin): Yes.

A. I think both are the facts. I think the plaintiff's memory is probably at fault, when he said he didn't receive a physical examination.



Q. (By Mr. Griffin): Do you think that both are true?

A. I think that both men were telling the truth.

Q. (By Mr. Griffin) And in your opinion which are you going to give the greater weight to, the evidence contained in plaintiff's exhibit 8, that I have read, or the testimony of the plaintiff that has been read to you in the hypothetical question, in arriving at your opinion?

A. Regarding this examination?

Q. (By Mr. Griffin) Yes, regarding that.

A. I think I could disregard both.

Q. (By Mr. Griffin) You are going to disregard these?

A. You mean the fact that he didn't have a physical examination when he was discharged? I would probably give greater weight to your record there of the examination.

Q. (By Mr. Griffin) To this record in plaintiff's exhibit 8?

A. I think I am a little confused about the two facts.

Q. (By Mr. Griffin) It will be necessary in giving your opinion to consider the record as true, or the testimony as true,—you have to say that one or the other,—both cannot be true.

A. I will give the greater weight to the testimony of the plaintiff.



Q. (By Mr. Griffin) So you have to disregard plaintiff's Exhibit No. 8?

A. What is Exhibit No. 8?

Q. (By Mr. Griffin) That is what I read to you where it contains that he says there was nothing wrong with him, and also the certificate of the examining officer, that is plaintiff's exhibit 8.

A. I will accept the testimony of the plaintiff.

Q. (By Mr. Griffin) And disregard the other?

A. Yes.

Q. (By Mr. Griffin) Now, Doctor Swindell, when the plaintiff made application for reinstatement of a yearly renewal insurance under date of July 2nd, 1927, in answer to question as to his condition, "Are you in good health?" he answered that he was in fair health. What consideration will you give that in your opinion?

A. I will regard that, but I have a feeling that the man didn't realize his physical condition when he made the statement.

Q. (By Mr. Griffin) You believe that this exhibit, Defendant's Exhibit No. 9, is wrong, and the condition as testified to by the plaintiff would be correct?

MR. DELANA: That is not true. That statement is not right, the statement that he is going to disregard it.

THE COURT: He has answered the question, and I believe has explained his answer.

MR. GRIFFIN: At this time we object to any opinion of this witness on the ground that he has testified he is going to disregard an important part of plaintiff's evidence, which is plaintiff's exhibit No. 8, which has been put in by plaintiff himself, and is a part of the plaintiff's case; that he will have to disregard that, and that he will weigh the testimony, which is not proper for an expert witness.

(EXAMINATION BY MR. DELANA)

Q. When you were first asked, Doctor, about this you stated that you considered both. Are you going to consider all the evidence of the plaintiff, that is, what the plaintiff said and also the record that is here?

MR. GRIFFIN: Objected to as leading and suggestive.

THE COURT: Overruled.

Q. Are you going to consider this, together with all the rest of the testimony?

A. Yes.

Q. You are going to weigh all of the evidence in giving this opinion?

MR. GRIFFIN: Objected to as leading, if the Court please.

THE COURT: Sustained.

Q. You may state whether you are going to weigh all

of the evidence given to you in the hypothetical question.

A. I am going to weigh all of the evidence given to me.

MR. GRIFFIN: Now, have you come to the conclusion that you are going to disregard it, or regard it, that is, plaintiff's exhibit No. 8.

A. I am going to regard it in my opinion.

MR. GRIFFIN: How much weight are you going to give it compared with the plaintiff's testimony as related in the hypothetical question?

MR. DELANA: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Over-ruled.

MR. GRIFFIN: Which will you give the greater weight, the plaintiff's exhibit No. 8, or the testimony with reference to what occurred at the time of the plaintiff's separation from service?

MR. DELANA: Objected to as repetition, if the Court please.

THE COURT: Well, let him answer again.

A. Which will I give the greater weight?

MR. GRIFFIN: Yes.

A. The plaintiff's testimony, or what else, did you say?

MR. GRIFFIN: Or that which is contained in plaintiff's Exhibit No. 8, in connection with his separation from the service? The question that was asked, "Have you any reason to believe that at the present time you are suffering from any wound, injury or disease, or that you have any disability or impairment of health, whether or not incurred in military service?" and his answer was "No," and the certificate of the examining physician, "That the soldier named above has been given a careful examination and it is found that he had pleurisy, R, on February 14th, 1919," I am asking you now which you are going to give the greater weight? That statement in Plaintiff's Exhibit 8, or the plaintiff's testimony?

A. I will probably give the greater weight to exhibit No. 8.

MR. GRIFFIN: That being the case, we will object to the opinion of the witness on the ground that he is weighing the testimony, which is not the province of an expert witness, and the defendant objects to the question on the ground that the hypothetical question, that it is unintelligible, and that it does not contain a full statement of the evidence, and that as it is related it calls for this witness to pass upon the credibility of the witnesses who have testified in this case, and that such an answer as is called for by the hypothetical question would invade the province of the jury.

THE COURT: Over-ruled.

MR. GRIFFIN: Exception, please.

A. It is my opinion that he was.

(DR. JAMES L. STEWART, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:)

### DIRECT EXAMINATION

Q. You have heard the statement of facts here yesterday, the hypothetical question?

A. Yes, sir.

Q. Assuming the facts as stated yesterday and taking into consideration your examination of Mr. Shaffer in 1932 and again in 1934, and assuming the following definition of total and permanent disability: Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously, any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, I will ask you to state whether or not you have an opinion as to whether Mr. Shaffer was totally and permanently disabled at the time of his discharge from the service in 1919, July 1919?

A. Yes, sir.

Q. I will ask you whether in your opinion he was at that time totally and permanently disabled?



MR. GRIFFIN: I object to the question, it was so lengthy as to render it unintelligible and containing conflicting evidence and any opinion rendered by this Doctor would be an invasion of the province of the jury the question calls for the ultimate fact to be decided by the Court and Jury.

THE COURT: Overruled.

MR. GRIFFIN: Exception.

A. I think he was totally and permanently disabled at that time.

(DR. ALFRED BUDGE, a witness called on behalf of the plaintiff, being first duly sworn testified as follows:)

### DIRECT EXAMINATION

Q. You heard the hypothetical question in this case.

A. Yes, sir.

Q. Assuming the facts as stated in that question and assuming the following definition of total and permanent disability: Total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, I will ask you to state whether or not you have an opinion as to

whether Mr. Shaffer was totally and permanently disabled on the 18th day of July, 1919, the date of his discharge.

A. Yes, sir.

Q. I will ask you whether in your opinion he was at that time totally and permanently disabled.

MR. GRIFFIN: Objected to as leading and suggestive and calls for an opinion which is an invasion of the province of the jury.

Q. I will ask you whether or not in your opinion he was totally and permanently disabled at the time of his severance from the United States Army in July, 1919.

MR. GRIFFIN: Objected to on the ground that it calls for an opinion involving the whole merits of the case and invading the province of the jury.

THE COURT: Overruled.

MR. GRIFFIN: Exception.

A. It is my opinion that he was.

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On the return of the verdict, in open court, the defendant asked and was granted sixty days in which to prepare, serve and file proposed bill of exceptions. Oct. 5, 1934.

(Title of Court and Cause.)

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ORDER EXTENDING TIME FOR FILING BILL  
OF EXCEPTIONS AND EXTENDING TERM

Filed Dec. 3, 1934.

Upon application of counsel for the defendant, and good cause shown,

IT IS ORDERED that the defendant have to and including the 15th day of January, A. D., 1935, in which to prepare, serve, and file Bill of Exceptions in the above entitled cause, and

IT IS FURTHER ORDERED that the September term, 1934, of this Court be, and the same hereby is, extended for a period of 64 days from this date for all purposes in respect to the preparing, submitting, lodging and settlement of said Bill of Exceptions.

DATED at Boise, Idaho, this 3rd day of December, 1934.

S/ CHARLES C. CAVANAH,  
DISTRICT JUDGE.

(Title of Court and Cause.)

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ORDER EXTENDING TIME FOR FILING BILL  
OF EXCEPTIONS AND EXTENDING TERM

Filed Jan. 15, 1935.

Upon application of counsel for the defendant, and good cause shown,

IT IS ORDERED that the defendant have to and including the 1st day of March, A. D. 1935, in which to prepare, serve and file Bill of Exceptions in the above entitled cause, and

IT IS FURTHER ORDERED that the September term, 1934 of this court be, and the same hereby is, extended for a period of 75 days from this date for all purposes in respect to the preparing, submitting, lodging and settlement of said Bill of Exceptions.

Dated at Boise, Idaho, this 15th day of January, A. D. 1935.

S/ CHARLES C. CAVANAH,  
DISTRICT JUDGE.



(Title of Court and Cause.)

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ORDER EXTENDING TIME FOR FILING BILL  
OF EXCEPTIONS

Filed Feb. 26, 1935.

Upon application of counsel for the defendant, and  
good cause shown,

IT IS ORDERED that the defendant have to and in-  
cluding the 27th day of March, A. D., 1935, in which  
to prepare, serve, and file Bill of Exceptions in the above  
entitled cause.

DATED at Boise, Idaho, this 26th day of February,  
1935.

S/ CHARLES C. CAVANAH,  
DISTRICT JUDGE.

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(Title of Court and Cause.)

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ORDER EXTENDING TIME FOR FILING BILL  
OF EXCEPTIONS AND EXTENDING TERM

Filed Mar. 25, 1935.

Upon application of counsel for the defendant, and  
good cause shown,

IT IS ORDERED that the defendant have to and  
including the 1st day of May, A. D., 1935, in which

to prepare, serve, lodge, settle and file Bill of Exceptions in the above entitled cause, and

IT IS FURTHER ORDERED that the September term, 1934, of this court be, and the same hereby is, extended to the 1st day of June, 1935, for all purposes in respect to the preparing, submitting, lodging and settlement of said Bill of Exceptions.

DATED this 25th day of March, A. D., 1935.

S/ CHARLES C. CAVANAH,  
DISTRICT JUDGE.

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(Title of Court and Cause)

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### STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties to this action as follows,

a. That the appellant hereby expressly waives its Assignments of Error numbered 4 and 5.

b. That the appellee hereby expressly confesses error in respect of Assignments of Error numbered 1, 2, 3 and 6 and consents that a judgment entered herein in the Court below may be reversed and that this cause may be remanded for retrial pursuant to law and the practice of the Appellate Court.

c. That this cause may be reversed and remanded without notice to either party and without the appearance of either party either by way of brief or person.

d. That the foregoing Bill of Exceptions has been examined by the respective parties hereto and contains all of the evidence adduced at the trial of this cause as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved and which are presented by the Assignment of Errors herein and all of the evidence presented to the jury bearing upon the questions involved in the Assignment of Errors reserved, and that the same may be settled as defendant's Bill of Exceptions and that the judge of this court may sign the hereto attached certificate settling the said Bill of Exceptions.

DATED this 4th day of April, A. D., 1935.

BENTON F. DELANA,

ELBERT S. DELANA,

*Attorneys for Plaintiff.*

J. A. CARVER,

United States Attorney  
for the District of Idaho.

E. H. CASTERLIN,

Assistant United States Attorney  
for the District of Idaho.

FRANK GRIFFIN,  
 Assistant United States Attorney  
 for the District of Idaho.

A. L. FREEHAFFER,  
 Attorney for the Department of  
 Justice.

*Attorneys for Defendant.*

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(Title of Court and Cause)

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CERTIFICATE OF JUDGE TO BILL OF  
 EXCEPTIONS

United States of America,    )  
 District of Idaho,                )   ss  
 Southern Division,                )

I, CHARLES C. CAVANAH, United States District Judge for the District of Idaho, and the Judge before whom the above entitled action was tried, to-wit,—the cause entitled Dewey M. Shaffer, Plaintiff, vs. United States of America, Defendant, which is No. 1677 of the Southern Division of said District Court,

DO HEREBY CERTIFY that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the trial of said cause and the same are hereby made a part of the record herein; that the above and foregoing Bill of Exceptions contains all material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein, which are necessary to pre-



sent clearly the questions of law involved in the rulings to which exceptions are taken and reserved and presented by the Assignment of Errors, and which is all of the evidence presented to the jury bearing upon the questions involved in the Assignment of Errors as amended by the Stipulation herein, and is a true Bill of Exceptions as to said questions of law; that the above and foregoing Bill of Exceptions was duly, regularly and timely filed with the Clerk of this Court and duly, regularly and timely served, settled and filed herein within the time allowed by law and the rules of this Court; that no amendments were proposed to said Bill of Exceptions excepting the same are embodied herein; that due, regular and timely notice of the time of settlement and certifying said Bill of Exceptions was given and that the same was settled, certified and filed during the trial term of this Court as extended for that purpose.

DATED at Boise, Idaho, this 10th day of April, A. D., 1935.

CHARLES C. CAVANAH.

*District Judge.*

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(Title of Court and Cause)

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PETITION FOR APPEAL

Filed Jan. 3, 1935.

COMES NOW the above named defendant, United

States of America, and says that on or about the 6th day of October, 1934, this Court entered judgment upon verdict of the jury in the trial of the above entitled cause against said defendant, in which judgment and proceedings had hereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the assignment of errors, which is filed with this petition.

And the petitioner further says that said cause was brought against said defendant under Title 38, Section 445, U. S. C. A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

WHEREFORE, the said defendant prays that an appeal be allowed in its behalf in the United States Circuit Court of Appeals for the Ninth Circuit of the United States for the correction of the errors so complained of; that said allowance operate as a supersedeas and no bond therefor or for costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

J. A. CARVER,

United States Attorney for the District of Idaho.

E. H. CASTERLIN

Assistant U. S. Attorney  
for the District of Idaho.

FRANK GRIFFIN,

Assistant U. S. Attorney for the District of Idaho.

A. L. FREEHAFFER,

Attorney for the Department of Justice.

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(Title of Court and Cause)

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## ASSIGNMENT OF ERRORS

Filed Jan. 3, 1935.

COMES NOW the defendant in the above entitled cause and files the following assignment of errors upon which it will rely upon the prosecution of the appeal of the above-entitled cause, from the judgment made by this honorable Court on the 6th day of October, 1934.

### I.

The Court erred in overruling defendant's objection to the hypothetical question propounded to Dr. O. F. Swindell as follows, to-wit:

“Q. Now, then, will each of you doctors listen to this question I am about to ask here. Each one of you doctors may assume the following facts: That Dewey Shaffer enlisted in Company B, Second Idaho, on April 15th, 1917; that he went overseas on December 24th, 1917; that he debarked at Liverpool, England, and went to LeHavre, France; in January, 1918, he landed at Camp Dijon, France; that along in March, 1918, he took quite a severe cold and had a cough; that he had a running of the ear, that he was confined to quarters for a period of from two to three weeks; that after being confined to quarters for two or three weeks he was placed on light duty consisting of taking dishes and victuals to the ‘mumps’ camp, where some boys were confined with the mumps; that he was placed on regular duty drilling heavy artillery until July 14th, about that time; that during this time Mr. Shaffer coughed continuously, that he had some difficulty in breathing; that on July 14th he contracted a heavier cold than the one he had before, and was placed in a hospital and spent four days there; that during that time he had night sweats and his cough was more severe; that he was returned, not to duty, but to light duty, the light duty consisting of helping the cook in the kitchen and waiting on table, and washing dishes; that after he was returned to light duty, he noticed himself and his fellow companions noticed that he had a cough and that his cough increased, and that his breathing was difficult, and that a part of



the time he was not able to be on light duty; that through July and August the weather was pleasant and they were at the Chateau-Thierry on the front, and that he went to the Meuse-Argonne, the St. Mihiel front, and from August the weather was very sloppy and wet underfoot, and they wore rubber boots and big hob-nailed shoes, that they camped out in the open and laid on the ground, that it became foggy and the weather became colder and disagreeable; that he had night sweats throughout this time, and that one of his buddies said that he had night sweats and his breathing was difficult, and several of the other boys with him said the same thing; that they would come in at night and go to the kitchen where he was supposed to be waiting, and that some of the time he would be in bed and not get up, that he was coughing and wheezing, and that his buddies would go in and see if there was anything they could do for him; that his cough increased, and the difficulty in breathing increased, and that at Armistice time he was placed in his billet, and that his cough increased up until about December 2nd, and his hard breathing increased. On December 2nd they started for France and traveled in trucks,—

“THE COURT: What do you mean when you say ‘they started for France?’

“MR. DELANA: I beg your pardon. I should say they started from France and into Germany, and that all except two or three nights they stayed in the open

and that it was snowing and raining and sleeting, and that Mr. Shaffer's cough became worse, and his breathing more difficult; that about December 22nd, about three days before Christmas, he was taken off light duty and had missed a number of days; that he was finally taken off entirely and was confined to his quarters; that on December 22nd, 1918, this happened, and that he remained on light duty, and while he so remained his cough increased and his hard breathing increased; that on February 14th, 1918 when he was placed in the hospital, and he remained in this hospital from February 14th until some time in April, and that at the time of entry to the hospital he had a temperature of 101 in the morning, and an afternoon temperature of about 103; that the admission to the hospital occurred on February 14th, 1919, as shown by the admission card; that under date of February 14th, 1919, the diagnosis is: Pleurisy, serofibrinous. On February 15th the service records show, lower lung, lower and middle lobe of right lung show numerous rales and increase in vocal fremitus; under February 20th the record shows the diagnosis of increased vocal fremitus and subcrepitant rales in right lower; February 24th shows by a lung examination flatness over right base, posterior, and the breath sounds about the same area, temperature 102; on February 25th the chest was tapped in the sixth interspace and midaxillary line and 100 c.c. of clear yellow fluid withdrawn; and later on March 8th it shows a few moist

rales in the right lower lung. Sheet 2 of this clinical record shows pleurisy, serofibrinous, with tachycardia; on March 20th, roughened breath sounds over the entire left chest, and no rales, left chest shows marked increase in vocal fremitus over right upper, absent breath sounds and diminished fremitus right lower; on March 23rd, pleurisy continues hard; March 26th the same, vocal fremitus still exaggerated in right upper, with exaggerated breath sounds on left, diminished fremitus over right lower, pulse continues high; April 3rd, developed, —I can't read that words, but the next is angina; April 15th, patient very anemic. You may assume that when he got to New York,—By the way, he was taken to France and landed in Brest and was kept in a hospital for a week or ten days, and then he was brought in a hospital ship to New York, and placed in a hospital and diagnosed in New York on May 30th as pleurisy, with effusion; he was brought from New York to Salt Lake City in a hospital train with nurses, and while in the service it is testified that along in March one of his buddies went to visit him and he was very thin and emaciated, and very poor, he was so listless that he didn't carry on any conversation, and one of his buddies went to visit him while he was in the kitchen and he passed him within five feet, and didn't know him, and one of his buddies who knew him as a boy testified that he was in such a condition that he didn't recognize him within about five feet of him; another buddy went to visit him

and he walked with him, and when he was walking three blocks sat down twice to rest, and he walked as if he was very weak, and he didn't recognize him until he walked up within a half block of him; that he then took him and placed him on a billet and gave him a can to spit in, that he was weak and emaciated; that he was visited by his folks while he was in Salt Lake City on about July 4th, 1919, and while there at Fort Douglas in Salt Lake City he kept asking his doctor to get out of the service, telling him that he wanted to be discharged, and his folks left him there, and he kept on asking for his discharge from service, and the doctor told him that he was not ready to release him, but finally on July 18th, 1919, he was discharged from service, and the manner of discharge was that he was sent down with fifteen or twenty other fellows, and they went to a room and he was presented with some blanks, some papers, for his signature, and he signed them; that they were not read to him; that he was not examined by a doctor at the time of discharge; and further that about the date of his discharge he was presented with a typewritten or printed blank whereon this question appears: 'Have you any reason to believe that at the present time you are suffering from the effect of any wound, injury or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?' and the typewritten answer appears: 'No.' And on the same date his superior officer made a certificate which



reads, 'I certify that the soldier named above has this day been given a careful physical examination, and that it is found that he is physically and mentally sound.' You may assume further that immediately following his discharge from the service he returned home; that he got off the train or car and walked about a mile home, and his sister went to meet him and didn't recognize him because of his paleness, weakness, and change in his condition; that that night he slept with his brother, and that he kept his brother awake by coughing and wheezing, and the next night his bed was changed and he was placed on the front porch, and thereafter his sister and his father and brother slept in rooms that were away,—they were the second rooms from him, and they heard him coughing and wheezing; that about the same night of the day after he got home he went to a doctor at Middleton, Doctor Hammer,—Doctor Hammer is not able to testify at this hearing,—and within two weeks after his discharge he went to Doctor Gue, and he told him to go to the mountains; that Doctor Gue had taken some X-rays, and that he, Mr. Shaffer, had made an attempt to get the X-rays but was not able to. That he went to the mountains and his chest pained him more, and his cough was worse, and that he came back within a couple of days; that he came back to Boise and went to Doctor Tolman; that he went there and was given a physical examination, a sputum examination and an X-ray was taken; that Doctor Tolman also punctured his lung and

took from him a cup to a cup and a half of yellow fluid; that Doctor Tolman testified that he had diminished breath sounds, positive sputum, limited motion of the chest, and that the X-ray and the entire examination had shown that he was moderately advanced with a tubercular condition, active condition, that Doctor Tolman treated him for about six weeks, and that he stayed at home the rest of the fall and winter, and went to bed in the mornings, and generally again in the afternoons; that he just laid around and didn't do anything; that his cough continued and his hard breathing continued, and that he bothered his folks and kept them awake some of the night, and along in the spring of 1920 that he leased a part of his father's place,—you may assume, first, that during the fall that he didn't play around with his boy friends; some of his boy friends told about their going swimming, and his having trouble walking about half a mile, and he didn't go in swimming with the other boys. During the fall in playing games there since he had come home, he didn't play in any of the games but just watched them, and didn't participate. He leased his father's place, or a portion of it, but his father put in most of the crops; that Mr. Shaffer stayed in bed most of the time and his cough continued, and his hard breathing also continued, and his father and the rest of the family helped him during that year; that about June, 1920, his brother-in-law came over and stayed with him, and did most of the work on the place, Dewey went out to help run a binder but all that he did in assist-

ing in the cutting of the grain was to bring the horses, and to relieve his brother-in-law at mealtime; and that he did some shocking of grain in the evenings for a couple of hours, and that while he was doing this shocking he had a coughing spell, and that his brother helped him to the house; he didn't help with the threshing except that he was kind of the supervisor, but did not do any of the work, and stayed in the house most of the time; that during September his brother-in-law had a job loading gravel, and Mr. Shaffer attended to the trap on the gravel pit; the gravel was loaded from a trap door and Dewey's job was to scrape the loose gravel into the truck, and also to keep track of the number of loads that were taken out; he was able to do this work for about half of the time that he was there; while he was there working he had a bunk on which he could rest, and he rested probably about half of the time; that one time his father came to visit with him and he was weak and emaciated and looked tired, and his father volunteered to relieve him, and did relieve him that day; that in the winter of 1920 and '21 he stayed at home and didn't do anything; that is, he didn't do anything a great deal of the time but just stay around the house lying down on the cot or on the bed; that in the spring of 1921 he was married and rented a ranch near Kuna; that he went out and endeavored to plow and was seized with a pain in the chest and with coughing and this hard breathing which continued; he went to the house

and he was relieved there at this job of plowing by his brother and some hired help, and he did none of the harrowing of the ground, but when it was ready for the grain he went out and tried to drill, and while drilling he was seized with a coughing and wheezing spell, and his wife went out and relieved him and did the rest of the drilling, and that he endeavored to run a mowing machine during the time they were putting up hay, and was seized with a coughing spell and didn't mow any more of the hay; that during the haying he endeavored to pitch hay on the loads and became exhausted, and then he went to the haystack and tried to handle the fork there, and that he did that until shortly afternoon when he was seized with a coughing and wheezing spell, and he went to bed for the rest of the afternoon; that at the time the grain was harvested it was done with a combine harvester and the people that did this harvesting with this combine, to pay for it and the help, took all of the grain except nine sacks; that the crop was put in by his brother-in-law, and other relatives as I have stated; on July 24th, 1921, he went to his brother-in-law's place, where they were going to get together and go to a Fourth of July celebration, that he got there in the evening and was feeling fairly well, that in the morning he was seized with a coughing and wheezing spell, and they took him on a cot to the celebration and that he laid on the cot most of the day at the celebration; that in the fall of 1921 he went with his wife to pick



prunes; that he went out about seven o'clock in the morning when the rest of them went out, and that he was seized with a coughing spell, and that after that day he didn't go out until after the dew was off; that while he was working at this prune picking the climbing of the ladder and the reaching up for the prunes would bring on these coughing and wheezing spells and he would have to go to the tent and sit down and rest; that during the day this would occur several times; that he went to Doctor Gue again for treatment; that during the latter part of September he went down to Fruitland and got a job trucking, but that he couldn't do this, and then they gave him a job as janitor, picking up the loose boxes, broken boxes and pieces and sweeping out, and that the sweeping would cause a lot of dust and it would bring on these coughing and wheezing spells, and his wife would do the sweeping for him. About the middle of October he went to Payette and got a job in a restaurant washing dishes, but that the heat and the steam there caused this coughing and wheezing, and that during the winter of 1921 and 1922 he and his wife ran a cream station in Payette, and that consisted of taking cream in big cans, but they would have to wash the cream cans and the powder they used in cleaning the cans caused him to cough and to wheeze. His wife did the washing of the utensils. That they had to test the cream, and in making this test they used acid, and that this acid caused him to cough and wheeze, and his wife



would do the testing of the cream, and also his wife opened up the cream station in the morning, and that he didn't come until all the way from nine o'clock until noon, that he was in bed a good deal of the time, and was sick a good portion of the time; that they kept this station until July, 1922, and that he then went to Glenns Ferry and got a job as hostler's helper, and that job was getting up and down on the engine and loading coal and water, and throwing switches for the engineer, and in doing that it would bring on these hard coughing spells and he lost about ten days of the time he was there, and that during that time he lost considerable weight; that he did nothing further until September, and at that time he applied for vocational training, and at about the same time he was examined by Doctor Budge; he was given a complete physical examination, his chest was percussed, and examination was made by stethoscope, examination of the sputum, and the examination of the sputum showed that it contained tubercle bacilli, and the diagnosis was that he was suffering from active tuberculosis and bronchial asthma; that he then started to school in September, and that he missed some days and half days; that he came home early in the afternoon and that he was attended by Doctor Budge, and that at that time he was taking for this asthma hypodermics; that before Christmas of 1922 he had a severe attack of choking and wheezing, and that Doctor Ensign of the Veterans Bureau, and later Doctor Budge was called

and gave him a hypodermic, which gave him some relief; that he continued in school until 1923, that he was sent to the University at Seattle, Washington, with the Government, and that his condition there was worse, his cough was severe, and he missed more school, and his sister testified that when he came home he was so weak that he couldn't walk upstairs, and he had night sweats, and that his pajamas and bedding were wet; and his service record shows that he had night sweats while he was in the service, and his buddies have testified that he also had night sweats while he was in the service, and his sister testified that immediately after he got home he had night sweats, and that it was necessary to change the bed because the bedding would be wet. That he stayed in school and missed some time, until March, 1923, when he was taken to a private hospital in Seattle; that he was confined in that hospital about ten days, and then he was taken to Portland to the Veterans Hospital and remained there until about July 10th of that year; that he was by the doctors at that time sent out camping; that he went back to Seattle and got his camp equipment and on the way he was seized with a wheezing and coughing spell, and on arriving at Seattle he was weak, and all that night he was unable to sleep until toward morning and then he was allowed to sleep until noon the next day; that he left Seattle and went out on this camping trip at or near the Dalles, Oregon, and he was to be gone for a period of about three weeks, but that he went back

to Portland in a couple of days; that he was released from the Portland Hospital with the advice to go to a drier climate, and that they went to Long Beach, California, taking fifteen days to make the trip, because they were driving slow on account of his condition, and he was not able to go very far at a time, he was weak and emaciated; that they got to California and rented an apartment and the next day he was asked to move on account of the disturbance of the other guests by his coughing and wheezing; that along in September, 1923, he was visited by one of his ex-servicemen who testified that he had a very severe coughing spell, and that he burned some kind of stuff and inhaled it, and it seemed to relieve him; that he got a job with a newspaper and had a crew of men or boys under him, and that he would take the crew out and while they were working he would rest, if he wanted to, and that he continued to oversee this crew for about five weeks; that he then got a job with a real estate firm and made two sales and earned \$45.00 in about five weeks; that in December, 1923, he applied for vocational training and was given vocational training, continuing with bookkeeping; that he continued until September, 1924, and that he and his brother and his wife testified that he was out of school days and parts of days at a time, that he would come early in the afternoon, and that he had a great deal of difficulty at night in breathing, and with his coughing, that he would get up and walk around sometimes,

and that sometimes at night he would get up and he and his wife would ride out in the hills as the air seemed to give him relief; that the doctor would give him hypodermics, and that in December, 1923, to September, 1924, he went,—that in December, about Christmas time, it was Doctor Morongie who gave him the hypodermic to relieve him, and that between December, 1923, and September, 1924, he would take hypos as high as twenty-five or thirty times; that in September, 1924, the Government changed him from bookkeeping in this vocational training to electrical fixtures, to a repair man's work, and that he was with one firm for about three weeks and that during that time he missed a good deal of time; that he went to Doctor Morongie, that he was coughing and wheezing more, and that while he was doing this work he went out riding more often at night; that he worked for the Hale Electric Company for forty-seven days, and that after he had been working there for about six days he was seized with a violent coughing and wheezing spell and went home, and was there for about ten days; that he went back to work again and had another spell and was carried out by one of his fellow workers; that he then from the Hale Electric Company to the Wilkerson Shop Company and took the same kind of training; that his wife testified on arriving home at night he would go to Doctor Morondie as high as sixty times in that year, and Doctor Morondie testified that he examined his chest, percussed, examined



it with a stethoscope and took a sputum test, and testified that the sputum was positive tubercular, that he had a temperature, and that his pulse was high, that he had a wheeze, and that he had to relieve him by giving him a hypodermic; that he treated him during the two years while he was taking vocational training, and on an average of every ten days and sometimes oftener, and sometimes less, and in the fall he was taking training and that he got worse; he and his wife then got a house in Alcadena and he quit vocational training and later came back to Eagle, Idaho, and that he was examined in 1925 by Doctor Smith and Doctor West, and that Doctor Smith testified that he was suffering at that time from tuberculosis and asthma, that he had a temperature and that his pulse was high, and that there was a limitation of the chest movement; that at about the same time he went to Doctor Budge and upon an examination of him by Doctor Budge who testified that he was suffering from active tuberculosis and that both lungs showed diminished breath sounds; that he stayed out home with his parents that winter and did nothing, and that in the spring of 1926 he rented the Ryles place east of Middleton, that in the spring he went out to plow and was seized with a coughing spell, and at one time his sister relieved him, and at another time his brother relieved him, and that in the drilling of the grain he did the drilling by working for two or three hours a day, that in the irrigating time he didn't do much of that, but that



at one time he was irrigating and he was seized with a coughing spell and one of his neighbor's boys came along and put him in his car and took him home; that in the haying time he went out with his father to pitch hay and he was seized with a coughing spell, and he got one of his neighbors to take him to his place and he rested the rest of the day, and in pitching he would pitch on the bottom of the wagon until it got up high, and then the other two of them put on the rest, and he would sit around in the shade and rest; in threshing time he did nothing except manage the crew, and during the cutting of the grain his brother ran the binder and he didn't do any shocking, but at threshing time he did nothing, except as I say, to manage the crew, that is, by the way of working. His neighbor had a thresher and he got a job hauling grain for a man by the name of Spillman, and his job was to haul the grain from the thresher to Middleton and unload it; he endeavored to handle it but it brought on coughing spells and he was unable to do that; that he has some clover to cut in a field and he went out at four o'clock in the morning and cut until the dew was off, and he got along fairly well the first morning, and that the other days he didn't get along; that in shocking the clover he went out the first morning,—or, rather, the second morning, after he was out about half an hour he was seized with this coughing and wheezing spell and the rest of the time he did nothing, he didn't go back at this and did not do anything the

balance of the fall; that in September he took a series of eight treatments from Doctor Elbert of Caldwell, and that same summer he went out with his brother to run a dyking machine, and this was dusty and he was unable to do this, and he hired one of the neighbors to come in and relieve him, and he went to the house; in 1927, as to his farming operations he testified he had to hire a lot of help and his expense was high, that the income was about \$125.00 in his favor,—that was not including the depreciation of his car and the running expense and the living expense of himself and wife; in January, 1927, he ran the same place,—that is, in 1927, I should say, he ran the same place again, the Ryles place, for the second year, and he went out to plow and fence and tried to harrow, and was unable to do so; he was seized with coughing spells and went to the house; he didn't do any plowing or harrowing; in harvest time he went out to relieve the regular man during the meal times; he didn't shock any grain at all, and during the threshing time he didn't do anything except just boss the job, and during the threshing he was seized with a very severe coughing and wheezing spell, and his brother and a neighbor boy helped him to the house, and he was not able to walk at that time without their help; he was forced to stop two or three times on the way, as these people testified that he had a hemorrhage, and that he raised about a cup or a cup and a half of blood on the way to the house; that he had a coughing spell that night, and they were

afraid they were going to lose him; Doctor Budge was called about five o'clock in the morning, and he came and administered a hypo; the next night he had a severe spell again and became unconscious; that his father and brother took him riding at night and in the early morning to get relief from these severe spells of coughing and wheezing, and that he was taken to Doctor Pittinger at Boise and thereafter for about a week they would go out riding at night to get relief from these severe spells; in July 1927 he applied for reinstatement of \$3,000 of the \$10,000 insurance policy; on the first page the question is asked: 'Are you disabled on account of any injury or disease?' and the typewritten answer was, 'Yes.' And in asking on the following page whether or not he was totally and permanently disabled, the answer was written in, 'No,' and the explanation is that at the time he came out of the service up to 1927 he did not know that war risk insurance covered disability, and that he didn't know it until 1929 when he went to the hospital here, to the Veterans Hospital, and was told by Doctor Stallings; he testified the only disability he knew anything about was compensation disability; that he gave his history as having had treatment by Doctor Tolman for his lungs, by Doctor Gue for his lungs, Doctor Smith for his lungs, Doctor Morondie for his lungs, and these were in 1920, 1926, 1924 and 1925, and in answer to the doctor's questions he answered that he was treated in 1919 and 1920 for lungs, and also in hospital No. 77 in Portland, Ore-

gon; that in August, 1927, he went to Doctor Boeck in Boise, and Doctor Boeck gave him a series of twenty-four treatments, that he had these treatments and that at the time he gave him these twenty-four treatments that he didn't get better and he advised him to change climate; Doctor Boeck said he was wheezing so badly that you could hear him for quite a distance; that he went to Yakima, he and his wife, got a job there in an apple warehouse, and he was there for about four weeks, and he worked twelve days out of the four weeks; he went to Doctor Middleton at Yakima, and he was given a course of treatments for asthma, taking adrenalin as high as twelve times at night; he left Washington and went to Portersville and then he went to Lindsay. This job he had in the warehouse at Yakima trucking apples, or fruit, brought on a severe coughing and wheezing spell, and he was then given a job scattering papers around for the boxes, the fruit boxes, and this is a job that a school boy did before him; that he was taking as high as 15 hypodermics of adrenalin during a night; he went to California and he rested there during the winter and about February 1st he leased a service station and sold oil and gas and accessories, and he got along fairly well for about two weeks, but he had the same inability to sleep, and his wife opened up the station in the morning and he would come all the way from nine o'clock until twelve, and they had a mechanic there to help with the work; his wife testified that there was



about a third of the time that he was seized with these coughing spells, and sometimes was carried out, and that at one time he was taken to the Community Hospital, and there he was given some treatment by being given hypos; that he stayed there about half a day and then his wife and some friends took him home, and he had to be helped into the house; that along in April, 1928, he took about thirty hypos from Doctor Arlett, and that his condition was about the same, and he came back to Eagle, and he was treated by Doctor Budge for asthma, and that about September 1st, 1928, he went to Washington, to Cashmere, Washington, and got a job as foreman in an orchard, and his duties there were to look after the pickers, and his testimony is that he worked perhaps a half, or a little more than half of the time while he was there, and the rest of the time he was in the tent resting, and upon going to the tent at noon or in the evening his wife or brother would find him lying down, he was taking adrenalin for relief practically every night; that he went back to California about October 1st, and got the same job that he had before, that is, distributing papers to the packers of this fruit to line the boxes with, that this took him three or four hours a day, and that he came back to Eagle after that about Christmas time in 1928, and stayed until March of 1929; that his condition got worse and he had more night sweats, more trouble at nights, and in March, 1929, he was treated by Doctor Budge for his trouble, and at that

time he had a temperature; in March, 1929, he left and went to Arizona. The testimony is the first day they traveled about a hundred miles, and they took about fifteen days or two weeks to make the trip, traveling very slowly because of his weakened condition. They stayed there for about five weeks, and he got worse, and then he went from there to Ely, Nevada, and got a job for about two weeks as clerk in a hotel, and that he was taking adrenalin all of the time and taking it on the job as clerk at the hotel; that he was having trouble and was taking this adrenalin when the boss caught him taking it one evening and he was discharged; that they got a room in an apartment house there and the landlady complained of his disturbing the other people, and they were required to move out; that they came in July, 1929, back and he went into the Veterans Hospital June 30th,—or rather on June 15th, 1930, and was doctored at that time in the Veterans Hospital and was confined to bed in the ward there taking tubercular treatment, rest in the morning and afternoon, and on getting out of the hospital he went to the mountains for his health. After he had been there for a short time he endeavored to help a sheepherder to butcher a sheep and it brought on a severe coughing spell and wheezing spell, and he was in bed for three or four days. Then he made a trip to Loon Lake, which was about five miles, and it took him six hours to make the trip, and he was there a short time when he got a sore throat and had pains in his chest,

when he came back to Boise, and the doctor then sent him to the hospital, that is, Doctor Budge after giving a complete examination and taking a test of his sputum, and the sputum was positive, testified he had an active tubercular condition, complicated by pleurisy and asthma. Mr. Shaffer stayed here in Boise until November, 1930, when he left and went to California. He thought that it would be better in California for his health. They took an apartment in Venice but he disturbed the people so much that he was requested to move, and they did move. They moved back to the east side of Los Angeles and lived there until they returned to Boise in February of 1931. During all of this time he was taking adrenalin, all winter. They lived in Boise until August, 1931, and he didn't do any work. A Mr. Wilcox testified that he slept with him in February, 1931, and that he was getting up in the night and taking adrenalin; that his bed was wet with night sweats, and that in August, 1931, he went to visit his folks at threshing time in Eagle, that he wasn't doing any work but being around there the dust of the thresher brought on a coughing spell, and about April 1st, 1932, he went up to Jordan Valley to cook; he was supposed to bring in the wood and the water, and his wife went up there to take this job; he was supposed to bring in the wood and the water, but in chopping the wood and carrying the water it brought on choking and coughing spells, and made him very weak, and in carrying the water it had to be carried

up an incline for about four hundred yards, and that brought on severe coughing spells, and thereafter the other men there carried the water for him; that in washing dishes the steam and the heat would bring on wheezing and coughing spells; that the last severe coughing spell he had, one of the boys went to get a car to take Mr. Shaffer to Jordan, and that during the time he was gone for the car Mr. Shaffer was taking adrenalin, and that when he came back they took him to Jordan Valley, and they had to stop for him to take his adrenalin because of the severe coughing spells; that in March 1932 an X-ray was taken at St. Luke's, and according to the testimony of Dr. Stewart it showed tuberculosis in both lungs; that about May 1st, 1932, Mr. Shaffer moved to Caldwell, Idaho, and that moving from one place to another there they had only personal effects to move, and he would have to make three or four trips in order to move them; that he had to move from one place to another because he was up in the night, coughing, and he disturbed the other people and they were requested to move, and that Mr. Wilcox testified that he and his brother and Mr. Shaffer were going on the Fourth of July on a camping trip up on Shaffer Creek, that they were to stay three or four days, that he was up all night the first night,—about all night,—coughing and wheezing, and he went to bed about sun-up in the morning and slept until noon, and that that afternoon they loaded up the car and came back home; that the last of July he



went to visit his sister in Seattle, intending to stay about three weeks, that upon getting there he was seized that night with a coughing and wheezing spell, and they were up most of the night and he was taking adrenalin and didn't go to bed until the next morning; that he stayed the next night, and the third morning they left to return home; that he was in bed then about a week or ten days,—or, rather, about ten days or two weeks. Mr. Wilcox testified he was around there for about three weeks, and that he often saw him taking adrenalin, and that he often woke him up; that about January, 1933, the only work he did—he did no work in 1931, and in 1932 the only work he did was in a sheep camp for about a week; in 1933 all he did was to help install some streets at Caldwell for the disabled veterans, and in 1933 he had another severe spell. His temperature was taken at 100 degrees and eight-tenths; that in the latter part of September, or in the month of November he moved to another place in Caldwell, carrying his personal belongings, and that brought on a coughing and wheezing spell, and a man helped them to move. He did no more work in 1933, and in January, 1934, he was seized with a severe coughing spell, and his friend Elbert Hardy testified that he was coughing severely, and that he went to the bathroom and that he could hear him coughing and wheezing from there; that he moved to Boise in March, 1934, and in March, 1934, he got a job with the FERA. His brother would take the horses to the job for him and take them home in the evening, and he would go

home in a car; his job was driving a team, but on this job his coughing and wheezing increased and he worked for two days the first week, and one the next, and two the third. From 1928 up to the present time Doctor Budge has testified that he has been attended by him once or twice a month, that he was suffering with active tuberculosis and pleurisy at the times he was examined; and Doctor Swindell testified that he had active tuberculosis in both lungs, and a sputum examination revealed positive sputum on June 27th, and on July 6th and on July 27th, he had tubercle bacilli. Assuming the above facts, and assuming the definition of total and permanent disability to be, that is, total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation; and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, now, Doctor, I will ask you, assuming these facts, and taking this definition, whether you have an opinion as to the total and permanent disability of the plaintiff at the time of his discharge from the army on July 18th, 1919.

“A. Yes, sir.

“Q. I will ask you to state whether or not, in your opinion, he was totally and permanently disabled at the time of discharge from the army on July 18th, 1919.

“MR. GRIFFIN: I would like to ask a question.

(Questions by Mr. Griffin):

Doctor, in this hypothetical question it was called to your attention that when the plaintiff separated from the service of the United States that this question was asked: ‘Have you any reason to believe that at the present time you are suffering from the effects of any injury or disease, or that you have any disability or impairment of health, whether or not incurred in the military service?’ and the answer to that is ‘No.’ And the plaintiff explains that by saying he wasn’t asked that question; that there is a certificate here reading, on plaintiff’s exhibit 8, by the commanding officer, ‘I certify that the soldier named above has this day been given a careful physical examination, and it is found that he had pleurisy R on February 14th, 1919,’ and that is signed by William F. Burns,—Burr, I guess it is, Major, M.C.U.S. Army. Plaintiff testified that he did not receive any examination. Now, Doctor, which of these do you believe? Do you believe the testimony in the hypothetical question, or do you assume the record as contained in Plaintiff’s Exhibit 8 as being true?

“THE COURT: He is asking you which of these do you take into consideration when you give this opinion?

“MR. DELANA: He might take both of them together.

“A. You want me to state which one I think are the facts?

“Q. (By Mr. Griffin): Yes.

“A. I think both are the facts. I think the plaintiff's memory is probably at fault, when he said he didn't receive a physical examination.

“Q. (By Mr. Griffin): Do you think that both are true?

“A. I think that both men were telling the truth.

“Q. (By Mr. Griffin) And in your opinion which are you going to give the greater weight to, the evidence contained in plaintiff's exhibit 8, that I have read, or the testimony of the plaintiff that has been read to you in the hypothetical question, in arriving at your opinion?

“A. Regarding this examination?

“Q. (By Mr. Griffin) Yes, regarding that.

“A. I think I could disregard both.

“Q. (By Mr. Griffin) You are going to disregard these?

“A. You mean the fact that he didn't have a physical examination when he was discharged? I would probably give greater weight to your record there of the examination.

“Q. (By Mr. Griffin) To this record in plaintiff's exhibit 8?



“A: I think I am a little confused about the two facts.

“Q. (By Mr. Griffin) It will be necessary in giving your opinion to consider the record as true, or the testimony as true,—you have to say that one or the other,—both cannot be true.

“A. I will give the greater weight to the testimony of the plaintiff.

“Q. (By Mr. Griffin) So you have to disregard plaintiff’s Exhibit No. 8?

“A. What is Exhibit No. 8?

“Q. (By Mr. Griffin) That is what I read to you where it contains that he says there was nothing wrong with him, and also the certificate of the examining officer, that is plaintiff’s Exhibit 8.

“A. I will accept the testimony of the plaintiff.

“Q. (By Mr. Griffin) And disregard the other?

“A. Yes.

“Q. (By Mr. Griffin) Now, Doctor Swindell, when the plaintiff made application for reinstatement of a yearly renewal insurance under date of July 2nd, 1927, in answer to question as to his condition, ‘Are you in good health?’ he answered that he was in fair health. What consideration will you give that in your opinion?

“A. I will regard that, but I have a feeling that the man didn’t realize his physical condition when he made the statement.

“Q. (By Mr. Griffin) You believe that this exhibit, Defendant’s Exhibit No. 9, is wrong, and the condition as testified to by the plaintiff would be correct?”

“MR. DELANA: That is not true. That statement is not right, the statement that he is going to disregard it.

“THE COURT: He has answered the question, and I believe has explained his answer.

“MR. GRIFFIN: At this time we object to any opinion of this witness on the ground that he has testified he is going to disregard an important part of plaintiff’s evidence, which is plaintiff’s exhibit No. 8, which has been put in by plaintiff himself, and is a part of the plaintiff’s case; that he will have to disregard that, and that he will weigh the testimony, which is not proper for an expert witness.

(EXAMINATION BY MR. DELANA)

“Q. When you were first asked, Doctor, about this you stated that you considered both. Are you going to consider all the evidence of the plaintiff, that is, what the plaintiff said and also the record that is here?”

“MR. GRIFFIN: Objected to as leading and suggestive.

“THE COURT: Overruled.

“Q. Are you going to consider this, together with all the rest of the testimony?”

“A. Yes.

“Q. You are going to weigh all of the evidence in giving this opinion?

“MR. GRIFFIN: Objected to as leading, if the Court please.

“THE COURT: Sustained.

“Q. You may state whether you are going to weigh all of the evidence given to you in the hypothetical question.

“A. I am going to weigh all of the evidence given to me.

“MR. GRIFFIN: Now, have you come to the conclusion that you are going to disregard it, or regard it, that is, plaintiff's exhibit No. 8.

“A. I am going to regard it in my opinion.

“MR. GRIFFIN: How much weight are you going to give to it compared with the plaintiff's testimony as related in the hypothetical question?

“MR. DELANA: Objected to as incompetent, irrelevant and immaterial.

“THE COURT: Overruled.

“MR. GRIFFIN: Which will you give the greater weight, the plaintiff's exhibit No. 8, or the testimony with reference to what occurred at the time of the plaintiff's separation from service?

“MR. DELANA: Objected to as repetition, if the Court please.

“THE COURT: Well, let him answer again.

“A. Which will I give the greater weight?

“MR. GRIFFIN: Yes.

A. The plaintiff's testimony, or what else, did you say?

“MR. GRIFFIN: Or that which is contained in plaintiff's Exhibit No. 8, in connection with his separation from the service? The question was asked, ‘Have you any reason to believe that at the present time you are suffering from any wound, injury or disease, or that you have any disability or impairment of health, whether or not incurred in military service?’ and his answer was ‘No,’ and the certificate of the examining physician, ‘That the soldier named above has been given a careful examination and it is found that he had pleurisy, R, on February 14th, 1919,’ I am asking you now which you are going to give the greater weight? That statement in Plaintiff's Exhibit 8, or the plaintiff's testimony?

“A. I will probably give the greater weight to exhibit No. 8.

“MR. GRIFFIN: That being the case, we will object to the opinion of the witness on the ground that he is weighing the testimony, which is not the province of an expert witness, and the defendant objects to the question



on the ground that the hypothetical question, that it is unintelligible, and that it does not contain a full statement of the evidence, and that as it is related it calls for this witness to pass upon the credibility of the witnesses who have testified in this case, and that such an answer as is called for by the hypothetical question would invade the province of the jury.

“THE COURT: Over-ruled.

“MR. GRIFFIN: Exception, please.

“A. It is my opinion that he was.”

## II.

The Court erred in denying defendant's objection to the testimony of Dr. James L. Stewart, a witness called on behalf of the plaintiff, which said testimony was as follows:

“Q. You have heard the statement of facts here yesterday, the hypothetical question?

“A. Yes, sir.

“Q. Assuming the facts as stated yesterday and taking into consideration your examination of Mr. Shaffer in 1932 and again in 1934, and assuming the following definition of total and permanent disability: Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it

is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, I will ask you to state whether or not you have an opinion as to whether Mr. Shaffer was totally and permanently disabled at the time of his discharge from the service in 1919, July 1919?

“A. Yes, sir.

“Q. I will ask you whether in your opinion he was at that time totally and permanently disabled?

“MR. GRIFFIN: I object to the question, it was so lengthy as to render it unintelligible and containing conflicting evidence and any opinion rendered by this Doctor would be an invasion of the province of the jury the question calls for the ultimate fact to be decided by the Court and Jury.

“THE COURT: Overruled.

“MR. GRIFFIN: Exception.

“A. I think he was totally and permanently disabled at that time.”

### III.

The Court erred in denying defendant's objection to the testimony of Dr. Alfred Budge, a witness called on behalf of the plaintiff, which said testimony was as follows:

“Q. You heard the hypothetical question in this case.

“A. Yes, sir.

“Q. Assuming the facts as stated in that question and assuming the following definition of total and permanent disability: Total disability is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, I will ask you to state whether or not you have an opinion as to whether Mr. Shaffer was totally and permanently disabled on the 18th day of July, 1919, the date of his discharge.

“A. Yes, sir.

“Q. I will ask you whether in your opinion he was at that time totally and permanently disabled.

“MR. GRIFFIN: Objected to as leading and suggestive and calls for an opinion which is an invasion of the province of the jury.

“Q. I will ask you whether or not in your opinion he was totally and permanently disabled at the time of his severance from the United States Army in July, 1919.

“MR. GRIFFIN: Objected to on the ground that it calls for an opinion involving the whole merits of the case and invading the province of the jury.

“THE COURT: Overruled.

“MR. GRIFFIN: Exception.

“A. It is my opinion that he was.”

#### IV.

The Court erred in denying defendant's motion for directed verdict made at the conclusion of all the evidence submitted in the case, which said motion was as follows:

“MR. GRIFFIN: If Your Honor please, comes now the defendant at the close of the evidence, the plaintiff and the defendant having rested, and moves the Court to direct a verdict in favor of the defendant and against the plaintiff for the reason and upon the ground that the evidence is insufficient to show or to prove that the plaintiff became totally and permanently disabled within the definition of total and permanent disability in evidence in this case, during the time that the policy of insurance was in full force and effect or at all, and there is no sufficient evidence upon which the Jury can predicate a verdict for the plaintiff and against the defendant in this case.

“THE COURT: The request will be denied.

“MR. GRIFFIN: Exception, please.

“THE COURT: Yes.”

#### V.

That the evidence is insufficient to support the verdict in that the evidence wholly fails to establish that the



plaintiff was or became permanently and totally disabled while his war risk insurance contract was in full force and effect or at all or at any time whatsoever.

VI.

That the verdict and judgment are contrary to law.

J. A. CARVER,  
United States Attorney  
for the District of Idaho.

E. H. CASTERLIN,  
Assistant United States Attorney  
for the District of Idaho.

FRANK GRIFFIN,  
Assistant United States Attorney  
for the District of Idaho.

A. L. FREEHAFFER,  
Attorney, Department of Justice.

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(Title of Court and Cause)

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ORDER ALLOWING APPEAL

Filed Jan. 3, 1935.

Upon the petition for appeal, accompanied by Assignment of Errors, heretofore filed herein, it being made to appear that said Petition should be allowed and that appeal is sought and brought up by direction of a de-

partment of the government of the United States, to-wit: the Department of Justice,

IT IS ORDERED that said petition for appeal be and hereby is granted and an appeal allowed.

DATED this 3rd day of January, A. D., 1935.

CHARLES C. CAVANAH,  
*District Judge.*

(Title of Court and Cause)

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CITATION ON APPEAL

Filed Jan. 3, 1935.

THE PRESIDENT OF THE UNITED STATES  
TO DEWEY M. SHAFFER and to DELANA and  
DELANA, his attorneys, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California within thirty days from the date hereof pursuant to Order Allowing Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Southern Division in action pending in said court wherein the United States of America is appellant and Dewey M. Shaffer is appellee, and to show cause, if any there be, why the judgment and proceedings in said Order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 3rd day of January, A. D., 1935.

CHARLES C. CAVANAH,  
*U. S. District Judge.*

ATTEST:

W. D. McREYNOLDS, *Clerk.*

(SEAL)

(Title of Court and Cause)

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PRAECIPE FOR TRANSCRIPT OF RECORD

Filed Jan. 3, 1935.

To the Clerk of the above entitled court:

Please prepare, certify, print, return and transmit to the Circuit Court of Appeals, Ninth Circuit at San Francisco, California, transcript of record in the above entitled cause, including therein

1. Complaint
  2. Amended Answer
  3. Minutes of the Court
  4. Verdict of the Jury
  5. Judgment
  6. Bill of Exceptions
  7. Petition for Appeal
  8. Assignment of Errors
  9. Order allowing Appeal
  10. Citation on Appeal
  11. Praecipe for transcript of Record
  12. Acceptance of Service of Assignment of Errors, Petition for Appeal, Order Allowing Appeal, Praecipe for Transcript of record, and Citation on Appeal.
  13. Minutes or stipulation and order concerning and settling Bill of Exceptions
- showing in each case fact and date of filing and acceptance of service. Omit printing of title, court and cause and verification.



J. A. CARVER,  
United States Attorney for  
Dist. of Idaho,  
E. H. CASTERLIN,  
Assistant U. S. Attorney for  
Dist. of Idaho,  
FRANK GRIFFIN,  
Assistant U. S. Attorney for  
Dist. of Idaho,  
A. L. FREEHAFFER,  
Attorney, Department of Justice.

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(Title of Court and Cause.)

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ACCEPTANCE OF SERVICE

Filed Jan. 4, 1935.

Service of

ASSIGNMENT OF ERRORS

PETITION FOR APPEAL

ORDER ALLOWING APPEAL

PRAECIPE FOR TRANSCRIPT OF RECORD

CITATION ON APPEAL

is hereby accepted and receipt of copies thereof acknowledged this 4th day of January, A. D., 1935.

DELANA & DELANA,

By BENTON F. DELANA,

*Attorneys for Plaintiff.*

(Title of Court and Cause.)

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### CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 112, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and the whole thereof, and that the same constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$139.60, and that the same has been paid by the appellant.

WITNESS My hand and the seal of said Court this 25th day of April, 1935.

(Seal)

W. D. McREYNOLDS,  
(215) 96 Clerk.